Nos. 93-70 and 93-108

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC. and
GILLIAM COUNTY, OREGON,
Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,
Respondents.

COLUMBIA RESOURCE COMPANY, L.P.,
a Washington limited partnership,
Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

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REPLY BRIEF OF PETITIONER COLUMBIA RESOURCE COMPANY, L.P.

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INTRODUCTION

The Oregon Supreme Court's decision upholding Oregon's imposition of a surcharge exclusively on foreign waste saddled the State with an uncomfortable dilemma; one its forty nine pages in response illuminates. The Oregon court upheld the surcharge because of its express nexus to "costs" incurred by the State in the administration of its solid waste program. (Pet App. 26.) Through-

out, however, the State has recognized that the Commerce Clause requires more—that intrastate commerce be similarly burdened. To that end, the State, in quintessential ad hoc fashion, formulated from the outset its "income tax equalizer" argument. Unfortunately for the State, though, the Oregon court pretermitted that argument, leaving the State with a problem on certiorari: A favorable result that is the product of indefensible constitutional reasoning. The State resolved its quandary the only way it could. It abandoned the Oregon Supreme Court's reasoning, electing instead to stage an independent defense of the surcharge. Thus, on page 49 of its response, the State offers its first, last and only statement in support of the Oregon Supreme Court's analysis, "[t]he judgment of the Oregon Supreme Court should be affirmed."

On this one point, then, at least, the parties seem to agree: The Oregon court incorrectly decided the case and its reasoning should no longer detain this Court.

With the Oregon court's reasoning for all intents and purposes removed from the equation, the State attempts to reduce the dispute [1] to one testing its claimed prerogative to finance the State's solid waste program with a transaction tax on nonresidents and an income tax on residents. To some, the State's equalized tax burden justification may appear superficially attractive; to complete the appearance, however, the State must convince the Court that its bifurcated scheme does not discriminate against interstate commerce, facially or practically. To do that, the State creatively reworks this Court's Commerce Clause teaching, occasionally dismissing it altogether. For example, according to the State, solid waste is a mere quasi commodity, resource protectionism is less abhorrent to the Constitution than other forms of parochial protectionism, disparate tipping fees produce no market impact,

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[1] It should not go unnoticed that the State offers no substantive response to petitioner's claims of protectionist purpose and effect, instead relying on a series of procedural objections calculated to divert the Court's attention away from those claims.

and petitioner failed to preserve all its arguments regarding protectionism. Fortunately for petitioner, only a State distracted by its inclination to discriminate in favor of local residents would be fooled by such claims.

THE LEGAL TEST IS NOT COMPLEX: IF THE SURCHARGE OREGON IMPOSES EXCLUSIVELY ON FOREIGN WASTE IS DISCRIMINATORY, OREGON MUST SHOW A LOCAL BENEFIT THAT CANNOT BE ADEQUATELY SERVED BY A NONDISCRIMINATORY ALTERNATIVE.

The prevailing constitutional standard testing the validity of state laws under the Dormant Commerce Clause has been so long settled it is axiomatic. Where a local enactment discriminates against interstate commerce on its face or in practical effect, the burden falls on the state "to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). Because demise of the surcharge is so intuitively apparent under this standard, the State presents an unabridged assault on the standard's greatest feature—its simplicity—and hopelessly confuses the analysis. Before bringing the State's eccentric analysis back to center, though, petitioner offers three comments on context it might earlier have thought likewise axiomatic.[2]

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[2] Both the State and amici curiae decry petitioner's reliance on *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992), as analytically controlling, with amici's disagreement sufficiently enthusiastic to cast petitioner's reliance as "border[line] frivolous." Br. for *Amici Curiae*, p. 13 n.13. The State and amici, relying on a *Chemical Waste* footnote, believe this Court expressly reserved for another day judgment on the propriety of a cost based surcharge. *See Chemical Waste*, 112 S. Ct. at 2016 n.9. That is not what footnote 9 says. The Court noted only that Alabama presented no argument, as it did below, that its $72 assessment was a compensatory fee or tax, noting further that both arguments were summarily rejected by the trial court. The implication is not that the Court wished to reserve the compensatory fee question, but

Despite this Court's pronouncements to the contrary in *Ft. Gratiot Landfill v. Mich. Dept. of Nat. Res.*, 112 S.Ct. 2019 (1992); *Chemical Waste; and Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the State has the temerity to characterize solid waste as quasi commercial: "Petitioners too quickly assume that solid waste can be equated with consumer goods that are actively bought and sold in a competitive market environment." *Br. for Resp.*, p. 16. Later revisiting the theme, the State writes, "[solid waste] is not a commodity that is sold in the market place; rather, it is disposed of at a cost. * * * Local businesses simply do not compete with out-of-state businesses in the sale of garbage." *Id.* at 26. The State's effort to deflect Commerce Clause scrutiny away from its surcharge on foreign waste finds support nowhere in this Court's cases and the State cites none. The State's effort also reflects its fundamental misunderstanding of the warring interests driving this dispute. Whether waste generators compete with one another for sale of their "product" is debatable; it is also, though, entirely irrelevant. Viewed through the lens of the Commerce Clause, the relevant commodity is not only waste but, more important, landfill capacity. And the relevant competitors are not interstate "sellers" of waste but, rather, interstate consumers of that landfill capacity.[3] Therefore,

> [w]hether the business arrangements between out-of-state generators of waste and the [instate] operator of a waste disposal site are viewed as "sales" of garbage or "purchases" of transportation and disposal services, the commercial transactions unquestionably have an interstate character. The Commerce

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rather that not even Alabama thought the compenstaory fee issue worth raising.

[3] Actually, the State's claim that no commercial market in waste exists is not just an analytical misfire, it is also wrong. Competition among landfill operators for greater shares of waste flow is fierce. Such has been the market reality since the privatization of waste disposal. Hopefully, the State recognizes this.

> Clause thus imposes some constraints on [the State's] ability to regulate these transactions.

Ft. Gratiot, 112 S. Ct. at 2023. Accordingly, the Court expressly declined to exempt solid waste from constitutional protection. *Id.* at 2023 n.3. To the extent, therefore, the State stops short of an exemption and asks the Court to extend just a little less protection to waste, the State asks this Court to dismiss the import of its unequivocal precedent.

Also, although not clearly discernible, the State appears to argue that resource protectionism is somehow less odious under the Commerce Clause than economic protectionism. *Br. for Resp.* pp. 25-30. For example, at page 28, the State observes, "[p]rotection of state resources is not an illegitimate purpose or effect; it simply cannot be achieved through the illegitimate means of forcing out-of-state waste to bear the burden, when instate waste does not." While this is another way of saying that conservation efforts may not discriminate, the State unmistakably intimates a qualitative difference between resource and economic protectionism.[4] "States," however, "may not compel the confinement of the benefits of their resources * * * to their own people whenever such hoarding and confinement

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[4] The State places considerable, indeed almost exclusive, emphasis on *Sporhase v. Nebraska*, 458 U.S. 941 (1982), portraying it as an analogous differential regulation case. First, a requirement that ground water extraction be "reasonable" and "not contrary to * * * conservation" is not analogous to different taxes. Second, to whatever extent this Court sanctioned exceptional treatment of foreign consumers in that case, the result is an aberration in the water conservation context which should have no bearing on landfill space:

> [A]lthough appellee's claim to public ownership of Nebraska's ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership *of other natural resources.*

Id. at 956-957 (citations omitted) (emphasis supplied).

impedes interstate commerce." *Hughes v. Oklahoma*, 441 U.S. 322, 336 n.15 (1979). Insofar as the State subtly solicits deference because it is protecting a local resource, the State asks the Court to grant reciprocally less deference to its own precedents.

Finally, the State does its best to convert petitioner's Commerce Clause challenge to a Privilege and Immunities challenge. *See, e.g., Br. for Resp.*, pp. 17-22. The State's very reference to the Privilege and Immunities Clause highlights its inability to find support in the Commerce Clause. Moreover, the authority cited does not support the accompanying propositions.[5]

All that really remains is to determine whether the State's surcharge discriminates against interstate commerce and, if so, whether the State can justify such treatment.

A. The Surcharge Discriminates Against Interstate Commerce.

1. *Contrary to the State's Contention, a Comprehensive Examination into Oregon's Tax Structure Need Not Precede a Finding of "Facial" Discrimination.*

The State takes issue with petitioner's view that a disparate fee, without more, constitutes facial discrimination. *Br. for Resp.*, p. 22. Petitioner and the State suffer a fundamental disagreement over the meaning of "facial." Given the equalized tax burden rationale upon which the State relies, it predictably maintains that a tax law is not "facially" discriminatory unless the court peers behind the statute and parses through a state's entire scheme of taxa-

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[5] For example, beginning at page 30, the State offers a series of Privilege and Immunities cases to show that disparate fees should not be subject to strict scrutiny under the Commerce Clause. Disparate treatment matters under the Commerce Clause because discrimination triggers strict scrutiny. Scrutiny under the Privilege and Immunities Clause, on the other hand, is triggered where the activity involved is "basic and essential." *Baldwin v. Fish & Game Com'n of Mont.*, 436 U.S. 371, 387 (1978). The authority is therefore inapposite.

tion to learn whether disparate treatment ultimately works to the disadvantage of some protected group.[6] Petitioner, conversely, considers the surcharge facially discriminatory because it singles out foreign consumers of Oregon landfill capacity for exceptional treatment.[7] The thrust of the State's argument on this issue, and indeed the thrust of the State's entire defense of the surcharge, is that the surcharge is not facially discriminatory because Oregonians supplement their contributions to the solid waste program via income taxes in an amount sufficient to equalize the burden.

First, the State asks this Court to accept that proposition on faith. The statutory scheme itself, however, explicitly belies the State's claim. Certain "cost" components of the surcharge are not mitigated through income taxes. "Cost" components such as "loss of quiet enjoyment," reimbursement for tax credits, lost disposal capacity, and a risk premium for unfunded environmental liability are not collected through domestic tipping fees either. *See* ORS 459A.110 and 459A.120. It is just not true, then, that Oregonians pay an equal amount through a tax combination.[8]

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[6] To support this proposition, the State cites *Maryland v. Louisiana*, 451 U.S. 725 (1981)—a compensatory tax case. Interestingly, several pages later, the State writes that "[p]etitioner's reliance on compensatory tax cases is misplaced." *Id.* at 40. More interesting still, the State writes this in spite of amici's virtually exclusive reliance on compensatory tax cases. *See, e.g., Br for Amici*, p. 13. Such fragmented reasoning illustrates the catch as catch can defense of the surcharge.

[7] Professor Regan, in his frequently cited article *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, explains that a per se rule against explicitness prevails. 84 Mich. L. Rev. 1091, 1148 (1986). In other words, distinctions by state line denominate a law as facially discriminatory.

[8] Incidentally, the State's characterization of these "costs" as *regulatory* is dubious. For example "loss of quiet enjoyment" and unfunded environmental liability, among others, are not regulatory costs at all because they have no relation whatever to administra-

Second, the State's claim that a facial inquiry entails a comprehensive examination of Oregon's tax structure to learn whether, ultimately, it practically discriminates against interstate commerce would diminish the Court's discrimination test. Strict scrutiny is triggered whenever a state law discriminates on its face *or* in practical effect. *Hughes v. Oklahoma*, 441 U.S. 335, 336 (1979). The State's suggestion reduces that two pronged inquiry to just one because every such examination would need to determine whether the law practically and finally discriminates. The interpretation saps the term "facial" of any substantive meaning. The Court should decline the State's invitation to render half its test superfluous.[9]

And third, the State's suggestion that its entire scheme of taxation must be examined relies upon a case incompatible with this context. In *Maryland v. Louisiana*, 451 U.S. 725 (1981), a First Use Tax was designed, in part, to equalize competition between Louisiana natural gas subject to a local severance tax and gas severed elsewhere not similarly subject to the local tax. *Id.* at 732. Indeed, this is the principal mission of a compensatory tax: To counterbalance the anti-competitive impact of a revenue device on the local economy. *See, e.g., Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1936) (compensatory use tax designed to place local retailers on competitive par with foreign retailers not subject to state sales tax).

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tive manpower or programs. It is arguable whether these are even "costs," but if so, they are certainly not regulatory.

[9] Amici also misapprehend the term facially *discriminatory* when they cite authority elucidating the term facially *invalid*. Amici maintain that petitioner must show the surcharge unconstitutional in every conceivable circumstance to prove the surcharge facially invalid. *See Br. for Amici*, pp. 9-10 (citing various First Amendment "overbreadth" cases). Facial invalidity is analytically distinct from facial discrimination. Petitioner maintains that the surcharge is discriminatory on its face and, if not unconstitutional per se, therefore subject to this Court's strictist scrutiny. *Hughes*, 441 U.S. at 337.

By definition, therefore, a compensatory tax rationale requires the court to examine separate tax schemes for equality. There is nothing about Oregon's surcharge suggesting that it was designed to effect a competitive balance; in fact, by the State's own admission, the surcharge is ostensibly designed to recover costs. *See* ORS 459.298. The legislation's object, therefore, was not to restore competition but to secure funding; consequently, the State is not entitled to a comprehensive assessment of Oregon's tax structure. With no reason for a comprehensive examination of Oregon's tax structure, the Court should, instead, follow the course adopted for taxes generally in *American Trucking Assn. v. Scheiner*, 483 U.S. 266, 289 (1987):

> Implementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing state on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens.

(Quoting J. Hellerstein, 1 State Taxation: Corporate Income and Franchise Taxes, par. 4.125[5], pg. 150 (1983)).

The fundamental question is whether a formal distinction is sufficient to activate the label "facially discriminatory" or whether the measure must evince substantive protectionism before being so coined. *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) provides the answer. West Virginia's Supreme Court upheld that State's gross receipts tax because domestic manufacturers, although exempt from the gross receipts tax, paid a higher manufacturing tax thereby offsetting an apparent burden on nonresidents. *Id.* at 641. This Court rejected the West Virginia court's compensating tax rationale, concluding that, "on its face," the gross receipts tax discriminated against interstate commerce by treating differently two companies selling tangible property at wholesale in West Virginia "depending on whether the taxpayer conducts manufacturing in the State or out of it." *Id.* at 642.

Correspondingly, despite the State's claim here that the burden born by foreign generators of waste is offset through income taxes, the surcharge scheme treats two consumers of landfill capacity differently depending on whether the consumer generates waste in the State or out of it. The surcharge scheme is therefore discriminatory on its face.

Finally, completely apart from the question whether the Court should entertain at all the State's comparative tax burden argument, the argument itself is unavailing.

> 2. ***Even Assuming the State's Intent to Equalize a Burden Currently Born by Oregonians through Income Taxes and assuming that Oregonians Pay an Equivalent Amount through Tipping Fees and Income Taxes, the Split Tax Structure Nevertheless Discriminates Against Interstate Commerce in Ways the State Cannot Deny.***

Undergirding the State's defense of the surcharge is its claim that funding Oregon's solid waste program with a tipping fee on foreign consumers of landfill capacity and a hybrid tipping fee income tax on Oregonians is a funding scheme not antithetical to the Commerce Clause. But this scheme emphatically offends the Commerce Clause because it subjects foreign consumers of Oregon landfill capacity to the possibility of multiple taxation. *See Armco*, 467 U.S. at 644. The State's "income tax equalizer" argument does not consider foreign consumers of Oregon landfill capacity who earn their income in Oregon. These persons will finance the State's solid waste program twice.

For example, a citizen of Washington residing in Clark County who works across the border in Portland, Oregon, will finance more than her "fair share" of the State's solid waste program. This Washington resident pays Oregon income tax on her earnings. She will also pay $2.25 per ton to dispose of her waste, which, by way of Clark County's flow control ordinance,[10] is destined for Mor-

[10] Clark County Ordinance, Ch. 9.32.

row County, Oregon. The nonresident, therefore, will pay both the $2.25 surcharge and the theoretical $1.40 per ton in Oregon income tax—a total of $3.65.[11] However, an Oregonian who disposes of his waste at the same landfill in Morrow County will pay just $.85 per ton and the theoretical $1.40 in income tax—a total of $2.25.

Moreover, even assuming away this problem of double taxation, the surcharge affects waste generators differently according to state boundaries. A nonresident's tax is measured exclusively by her consumption of Oregon landfill capacity; an Oregonian's tax, conversely, is only nominally linked to consumption. While a nonresident consumer will incur $2.25 of tax liability with each additional ton of space consumed, an Oregonian incurs just $.85—a significantly disparate disincentive to the consumption of landfill capacity. Because an Oregonian's tax liability primarily fluctuates with her income and not her consumption, a nonresident is far more likely to mitigate her waste production and consequent consumption of the State's disposal space. At p. 23, the State writes, "[t]he small differential between Oregon's instate and out-of-state waste disposal fees permits only the weakest inference that out-of-state garbage producers suffer a burden that will serve as a disincentive to their use of Oregon landfills." The difference between the $.85 domestic tipping fee and the $2.25 foreign tipping fee is 265%. To say that disparity extends "only the weakest" disincentive belies reality. Indeed, DEQ itself offered elasticity calculations anticipating the surcharge. (See R.0214.)

The State may effect its avowed purpose of reducing waste production[12] by penalizing the flow of all waste

[11] Although never specifically stated, petitioner assumes that the State's reference to income taxes paid by Oregonians and "others with sufficient instate activity" is an attempt to address this argument. *Br. for Pet.*, p. 3; *see also Br. for Amici*, p. 12 n.12.

[12] At p. 4 of its response, the State maintains that as a result of its conservation efforts, "Oregon landfill capacity will be consumed more slowly—to the benefit of present and future generations of

to Oregon landfills, but by imposing a scheme that is not similarly transaction sensitive the State exports a disproportionate burden of conserving Oregon's landfill capacity. *See Philadelphia*, 437 U.S. at 629.

3. *Neither the Nature of the Proceeding, the Breadth of the Record, nor Petitioner's Posture Below Preclude a Showing of Protectionist Purpose or Effect.*

Raising the same objections this Court apparently rejected in granting certiorari, the State complains that the limited nature of petitioner's challenge precludes petitioner from proving the surcharge effectively discriminatory. *Br. for Resp.*, p. 14. On page 34 of its brief, the State offers another in an exhausting litany of references to the fact that no hearing was conducted nor factual findings made concerning the operative impact of the surcharge on interstate commerce.[13] The State so far

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Oregonians *and* present and future generations of out-of-state residents whose waste can and will be disposed of in Oregon." The statutory scheme itself reveals this statement for the unabashed ad hoc justification it is. The Oregon legislature expressly declared that "[t]he disposal in Oregon of domestic solid waste generated both outside and within Oregon will reduce the total capacity *available for disposal of domestic solid waste generated in this State* * * *." ORS 459A.105(2) (emphasis supplied). The State's decision to impose the surcharge was not so neighborly as it would have the Court believe.

[13] The State's transparent effort at relentless repetition on this irrelevant point, almost as if calculated to affect the Court subliminally, underscores the State's discomfort with the substantive issues.

The State portays petitioner's choice of procedure as calculated, suggesting that federal court, state trial court, or agency review would have been a more responsible course. On the contrary, petitioner's forum selection was the responsible course. A section 1983 action in federal district court suffered exposure to defenses including failure to exhaust administrative remedies. Alternatively, under Oregon's Administrative Procedures Act, a state trial court has jurisdiction to review a rule only after its violation as a defense to enforcement of any agency order. ORS 183.484. Finally, the administrative remedy to which the State referred in its opposition

misapprehends Petitioner's theoretical effects argument that it accuses Petitioner of staging an "as applied" challenge. *Id.* at p. 42.

Briefly, the record's failure to factually chronicle the precise effect levied by the surcharge on interstate commerce is absolutely immaterial.[14] The State's contention to the contrary belies at least a half century's worth of decisions, for time and again the Court has gleaned protectionist effect from the face of a law. For example, in *Armco*, Justice Powell employed his own hypothetical to demonstrate that West Virginia's manufacturing tax, on its face, discriminated against interstate commerce. The Court dispelled the State's concern here that the record is inadequate:

> Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a state that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. That is not the test.

Id. at 644. As if that were not sufficiently on point, Justice White wrote this about Louisiana's First Use Tax:

> It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.

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to the petition is discretionary with the agency or requires violation of the rule. ORS 183.410 ("On petition of any interested person, any agency may in its discretion issue a declaratory ruling with respect to the applicability * * * of any rule or statute enforceable by it").

[14] Due to the pendency of litigation and the effect of chapter 385, section 92, Oregon Laws 1991, the surcharge, as the State well knows, has yet to be collected.

Maryland, 451 U.S. at 759-760.[15] Evidently, the State's claim that factual findings must precede invalidation is one the Court has already entertained. The assertion has not been well taken.

The State, moreover, argues that petitioner abandoned any foray into the record in search of protectionism because petitioner challenged the surcharge on its face. *Br. for Resp.* p. 44.[16] According to the State, "[t]he procedural route of review petitioners invoked required the rule to be considered in isolation." *Id.* at 43-44. This argument emphatically cannot be reconciled with the State's earlier one that a facial review of the surcharge requires a comprehensive examination of Oregon's tax structure to determine whether, in the final analysis, the surcharge discriminates.

Finally, the State mounts a waiver argument, claiming that petitioner "cannot come before this Court making [protectionism] challenges that [it] never presented in any form * * *." *Id.* at 45. At page 19 of petitioner OWS' brief to the Oregon Court of Appeals,[17] petitioner

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[15] This language was quoted later in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406-407 (1983), to support Justice Blackmun's use of an elaborate hypothetical to illustrate the constitutional infirmity of New York's preferential tax credit. *See id.* at 400-402 n.9.

[16] The State also urges the Court to ignore portions of the record dramatically illustrating its protectionist intent, *see Opening Brief for Petitioner CRC*, pp. 17-22, because, according to the State, the record was compiled not for that purpose but instead to demonstrate compliance with rulemaking procedures. *Br. for Resp.*, p. 47. The State apparently believes that record evidence, no matter how probative, should be disregarded if what the evidence proves is incompatible with why it is there. Essentially, the State asks the Court to view not just the record's depth as inadequate but that which the record offers as inadequate too. It is difficult to imagine an argument further subordinating substance to form.

[17] Because the division of work assigned petitioner OWS with responsibility for briefing the Commerce Clause issue throughout

wrote, "key legislators responsible for the passage of HB 3515 suggested that banning, or at the least, discouraging disposal of out-of-state waste may have been the purpose of the surcharge." At page 21 of the same brief, OWS maintained, "[t]his difference in treatment both discourages the use of Oregon landfills by out-of-state waste generators and requires out-of-state generators to pay for the capacity they use, solely for the benefit of Oregonians." That statement is the essence of petitioner's protectionism rejoinder to the State's equalized tax burden justification.[18] The State's claim that petitioner has not advanced its protectionism claims "in any form" is simply inaccurate.[19]

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the State Court proceedings, petitioner CRC participated in those arguments by way of incorporation.

[18] Nor did petitioner renounce its protectionism arguments before the Oregon Supreme Court. Responding to the court of appeals' treatment of the surcharge, petitioner wrote,

> [t]o the extent the court meant to imply that the discriminatory surcharge is permissible because it serves the purpose of reducing the amount of waste disposed of within Oregon, the court's reasoning squarely conflicts with the U.S. Supreme Court's decision in *Chemical Waste Management, Inc., supra*, which held that a discriminatory tax cannot be justified on that basis.

Pet. OWS' Pet. for Rev. to Or. Sup. Court, pp. 17-18.

[19] As a correlate, the State argues that petitioner is not entitled to make any arguments not specifically advanced below. *Br. for Resp.*, p. 44. The State confuses new arguments with new issues. New issues, if not passed upon below, may not be raised on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). One issue in this case is whether, under the Commerce Clause, Oregon's surcharge on foreign waste discriminates against interstate commerce. New arguments supporting either side's position on the issue are not barred on appeal. *Campbell, Extent to Which Courts of Review Will consider Question not Properly Raised and Preserved—Part I*, 7 Wis. L. Rev. 91, 97 (1933). Petitioner's observations concerning the surcharge's protectionist nature, even assuming they were not articulated below, are and always have been derived from the face of the rule and the record. The State's protest, therefore, is unavailing.

Lastly, it is interesting that the State's entire response to petitioner's protectionism claims deduced from the record is confined to a series of procedural objections; the State offers nothing to rebut the substance of petitioner's arguments. To level the State's own eloquence against it: The State "invoke[s] tests rather than analysis, and * * * serve[s] results rather than principle." *See Br. for Resp.*, p. 23.

B. A Uniform Surcharge on All Solid Waste is an Adequate Nondiscriminatory Alternative to Achieve the State's Conservation Goals; the State, though, Considers it Inadequate Because it Will Impede the State's Efforts to Discriminate Against Foreign Waste.

Assuming this Court finds Oregon's surcharge discriminatory, the State maintains that its surcharge must survive nevertheless because no other scheme of taxation will allow the State to assess a transaction tax on foreign consumers of Oregon landfill capacity and, at the same time, "spread[] part of the cost of in-state solid waste among all [Oregonians] and others who directly benefit from the State's waste management program, regardless of their individual contribution to the problem." *Br. for Resp.*, p. 37.

That argument, stripped to its essence, is a claim that any other scheme of taxation will not allow Oregon to discriminate against foreign generators of waste. Petitioner has already explained why a consumption tax on nonresidents contrasted with an income tax on residents discriminates in a manner inimical to the Commerce Clause. The State's claim that other alternatives are inadequate because they preclude discrimination cannot be what this Court intended by its use of the phrase "nondiscriminatory alternatives adequate to preserve the local interests at stake." *See Hunt*, 432 U.S. at 353. Should New Jersey have been free to decline this Court's "invitation" to strike its ban on foreign waste because no ade-

quate alternative would allow it to continue banning foreign waste? All would agree that is preposterous.[20]

The State laments a uniform fee because it puts the State to the unenviable task of choosing whether to lower the surcharge and not recover its "costs" or to raise the domestic fee and forfeit its right to spread costs among Oregonians irrespective of waste production. The State characterizes the former as "superficial" because "[a]n increase in the in-state waste disposal fee would have absolutely no impact on the free-flow of out-of-state garbage into Oregon Landfills." *Br. for Resp.*, p. 38.

Petitioner offers four comments. First, the Oregon Legislature already determined that should the surcharge be invalidated, domestic and foreign consumers of Oregon landfill capacity will be charged the same $.85 per ton. *Compare* ORS 459A.110(6) *with* Or. Laws 1991, Ch. 385, §§ 91, 92. Second, assuming the truth of the State's unsupported claim, the scheme would at least be constitutionally acceptable. Otherwise, that argument would obtain every time a state's realignment with constitutional principles failed to substantively advance the plain-

[20] At page 36 of its response, the State writes that a uniform fee, as nondiscriminatory alternatives go, is a "novel approach [nowhere] found in any of this Court's Commerce Clause or Privilege and Immunities Clause cases." That is genuinely startling. The State half-heartedly attempts to distinguish the line in *Chemical Waste* explicitly suggesting uniformity as an alternative by noting that it was Alabama's *purpose* to divert hazardous waste elsewhere and it was this protectionist *purpose* that might permissibly be advanced with a uniform fee. *Id.* at 36 n.20. Assuming the Court is not persuaded here that Oregon's purpose is similarly but more cleverly protectionist, the State's purported justification does not consider that economic protectionism inheres in purpose or *effect*. *See Chemical Waste*, 112 S. Ct. at 215 n.6. It is a remarkable reach, indeed, to recognize that uniformity is a suitable alternative to a scheme that purposefully diverts foreign waste elsewhere yet maintain that it has never been suggested as an alternative to a scheme having that same effect.

tiff's position. Certainly, constitutional jurisprudence is not so myopic.

Third, the State's claim considers just half the picture. It is not enough to scrutinize in isolation the effect of a uniform fee on interstate commerce; the effect on intrastate commerce must also be scrutinized to ensure equality of treatment. *See Maryland*, 451 U.S. at 759. As it currently stands, foreign consumers of landfill capacity will use alternative landfill sites if a price less than $2.25 per ton can be secured. Oregonians, conversely, will not send their waste elsewhere unless a price less than $.85 per ton is obtained. Just as before, the economics are plain. The Commerce Clause demands that market incentives be the same for interstate and intrastate commerce.

Fourth, the State's argument fails to appreciate the most fundamental threat Oregon's differential fee poses under the Commerce Clause: A multiplication of preferential trade barriers. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). Because the Commerce Clause is a product of political philosophy and is prophylactic in design, appearances cannot be minimized, especially where the interest at stake is union. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

CONCLUSION

Because the surcharge assessed by Oregon on foreign waste discriminates against interstate commerce on its face, in its purpose, and in its effect, thereby passing to the State a burden of justification it cannot carry, petitioner respectfully requests that this Court reverse the decision of the Oregon Supreme Court and strike ORS 459.297, ORS 459.298, OAR 340-97-110, and OAR 340-97-120 as violative of the Commerce Clause of the United States Constitution.

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